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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1027

DAN LEE WHITE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on December 11, 1968.

CITATIONS TO OPINIONS BELOW

Trial in the United States District Court for the Southern District of Iowa, Central Division, was to a jury and no decision of the District Court is reported. Instructions issued by the District Court to the jury, pertinent to this Petition, are printed in Appendix hereto, infra, pages 4a-5a. The opinion of the Court of Appeals is set out in the Appendix hereto, infra, page 1a-5a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 1968. On January 10, 1969, Honorable Byron R. White, Associate Justice, extended the time for filing Petition for a Writ of Certiorari to and including February 9, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Whether the District Court erred in overruling Petitioner's motions for a judgment of acquittal which contended that Petitioner, as a matter of law, was not guilty of wilfully and knowingly failing and refusing to report for induction as charged in the indictment.

STATUTE INVOLVED

Petitioner was indicted for alleged violation of Title 50 App. U.S.C. Section 462.

STATEMENT

The Grand Jury for the United States District Court for the Southern District of Iowa, Central Division, indicted Petitioner for wilfully and knowingly failing and neglecting to comply with a Selective Service Board Order that he report for induction into the Armed Services. The offense was alleged to have continued from October 3, 1966, up to and including the date of indictment, July 18, 1967.

Petitioner pled not guilty and the case was tried before Honorable Roy L. Stephenson and a Jury, resulting in a judgment of guilty and a sentence to five years imprisonment.

Petitioner was issued an order to report on October 3, 1966, for induction. After receiving the order but before

the date for induction, Petitioner requested, received, and submitted to his Local Selective Service Board a special form provided for applicants claiming the status of conscientious objector. He, also, returned the Order to Report for Induction.

Between the return of the induction order to the Board with the conscientious objector form, and the notification to Petitioner by the Board on October 31, 1966, that his application had been considered and found not to merit reconsideration of his classification, there were no instructions or communications from the Board to Petitioner.

The Trial Court held as a matter of law that the Petitioner was not guilty of wilfully and knowingly failing to report and submit to induction between the time that he was originally to have reported and the time that the Selective Service Board notified him that his conscientious objector application had been denied. Appendix Pages 4a-5a.

The October 31, 1966, letter advised Petitioner to report to his nearest Draft Board and request a transfer for induction, and included the original order to report for induction which directed him to report on October 3, 1966. Appendix pages 2a-3a.

Petitioner's claim is that the directives he received from his Local Board were confusing and misleading because the letter of October 31, did not order him to report for induction but ordered him to report to a draft board and request a transfer of his place of induction from Iowa to his residence in New York. Failure to comply with this order is not a crime. 50 App. U.S.C. § 462.

The Court of Appeals based its opinion upon the doctrine that an induction order imposes upon the registrant a continuing duty to submit to induction, United States vs. Prince, 398 F. 2d 686 (2nd Circuit 1968); Silverman vs. United States, 220 F. 2d 36 (8th Circuit 1955) and that return of the induction order to Petitioner by the Local

Board with its letter of October 31st was sufficient to create the requisite criminal intent which the District Court found not present between the time he returned the induction order and October 31.

But, Petitioner contends that the Court of Appeals decision and the rulings of the District Court fail to give sufficient weight to the fact that it was impossible for Petitioner to comply with the returned induction order as it directed him to report on October 3, 1968, a date already past.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is directly in conflict with the decision of the Ninth Circuit in Graves v. United States, 242 F. 2d 878 (1958) and the Third Circuit in United States v. Mancuso, 130 F. 2d 90 (1943).

In Graves v. United States, supra, 252 F. 2d 878, a selective service registrant was held not guilty of failing to be inducted because the government had told him to perform some other act.

Graves sought postponements of an induction order to attend to private business. Upon the assurance of the Chairman of his selective service board that he would be given a sixty day extension, he became unreachable as a necessary result of his business. Subsequent induction orders counter-manding the Chairman's assurance failed to reach him. Upon arriving home, Graves went, with his mother, to the selective service board, where they were told he should not report for induction, but should wait to be arrested.

The government contended Graves had a continuing duty to report which he knowingly violated during this waiting. In reversing the judgment of conviction, the Court of Appeals held the words "wilfully and knowingly" require a culpable intent, and that Graves was justified,

from what he was told by his selective service board, in believing he had no duty to report after returning from his business. Graves v. United States, supra, 252 F. 2d 878, 882-883.

The registrant in United States v. Mancuso was sent a letter ordering him to report for induction, after an original order had been held in abeyance by a District Court injunction. The Court of Appeals held that the letter was insufficient to support a criminal conviction for refusal to be inducted.

The Record contains no evidence that the government ever informed Petitioner he had any outstanding duty other than that contained in the letter of October 31, 1967, to go to a selective service board in New York and ask for a transfer of his place of induction, pursuant to 32 C.F.R. § 1632.9. But this procedure is discretionary with the registrant.

The failure to report for induction, to support a criminal conviction, must be deliberate and with knowledge and not something which is merely negligent, careless, or inadvertant. Browder v. United States, 312 U.S. 335, 341. It must have been done without ground for belief it was lawful, with bad purpose, and an "evil motive". United States v. Murdock, 290 U.S. 389, 394.

An intent to invade the law is a necessary element of the offense. Silverman v. United States, 220 F. 2d 36 (8th Circuit 1955). Proof of an intentional failure requires evidence that a defendant knew what was wanted of him; that he had an awareness of restrictions of the statute under which he was indicted or a reckless disregard of the statute. United States v. Inciso, 292 F. 2d 374, 380 (7th Circuit 1961). Regulations making a duty to report "continuing" cannot eliminate this requirement. United States v. Trypuc, 136 F. 2d 900 (2nd Circuit 1943).

Clearly, the communications to Petitioner from the government so confused his responsibilities as to prevent proof of failure to knowingly and intentionally report.

The instant case in which the selective service system told Petitioner to do one act, and then prosecuted him for not doing another act, demonstrates the need for attention by the Supreme Court to the administrative procedures and practices of the system, especially at the level of Local Selective Service Boards.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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